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IN THE

Supreme Court of the United States

October Term, 1962

No. 520

HARLOW CHAMBERLIN, on his own behalf and in behalf of all other persons similarly situated,

Appellant,

vs.

THE DADE COUNTY BOARD OF PUBLIC INSTRUCTION, *et al.*,

Appellees,

vs.

DAVID HUME, *et al.*,

Intervening Appellees.

EDWARD RESNICK, PHILIP STERN, and ELSIE THORNER, in their own behalf, and in behalf of all other persons similarly situated,

Appellants,

vs.

THE DADE COUNTY BOARD OF PUBLIC INSTRUCTION, *et al.*,

Appellees,

vs.

DAVID HUME, *et al.*,

Intervening Appellees.

On Appeal from the Supreme Court of Florida

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the final judgment of the Supreme Court of Florida, originally entered in this suit on

June 6, 1962, affirming a final decree entered in this suit in the circuit court of the Eleventh Judicial Circuit in and for Dade County, Florida, which judgment became final upon denial of a petition for rehearing on July 31, 1962. We submit this jurisdictional statement to show that this Court has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the Supreme Court of Florida, dated June 6, 1962, is reported at 142 So. 2d 21. (A copy of the opinion and judgment of the Florida Supreme Court is attached hereto as Appendix A.) The opinion of the Circuit Court of Dade County is reported at 17 Fla. Supp. 183. (A copy of the Circuit Court opinion is attached hereto as Appendix B.)

Jurisdiction

On April 15, 1961, the Circuit Court of Dade County issued an opinion, followed by an order, dated May 10, 1961. The Circuit Court, in part, dismissed appellants' complaints insofar as they alleged that the guarantee of religious freedom and against establishment of religion in the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment, was violated by certain practices of the appellee School Board, including one practice required by a Florida statute (Fla. Stats. 1961, Sec. 231.09), the constitutionality of which was challenged by the appellants.

On appellants' appeal, the Supreme Court of Florida, by opinion and judgment filed on June 6, 1962, affirmed the judgment of the Circuit Court. A petition for rehearing was denied on July 31, 1962.

On August 27, 1962, appellants filed in the Supreme Court of Florida its Notice of Appeal to this Court.

The jurisdiction of this Court to review the judgment of the Supreme Court of Florida is conferred by 28 U. S. C. 1257(2). The following decisions sustain the jurisdiction of this Court to review the judgment on appeal in this case. *Williams* v. *Bruffy*, 96 U. S. 176, 183 (1878); *Adamson* v. *California*, 332 U. S. 46, 48 (1947), and *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 547 (1922).

Statutory and Constitutional Provisions Involved

The Florida statute (Fla. Stats. 1961, Sec. 231.09) whose constitutionality is drawn into question provides as follows:

> Duties of Instructional Personnel.—Members of the instructional staff of the public schools, subject to the rules and regulations of the state board and of the county board, shall perform the following functions:
> * * *
>
> (2) Bible Reading.—Have, once every school day, readings in the presence of the pupils from the Holy Bible, without sectarian comment.

The First Amendment to the United States Constitution, insofar as here relevant, provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *" The Four-

teenth Amendment provides in part that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

The following questions are presented by this appeal:

(1) Is the Florida statute (Fla. Stats. (1961), Section 231.09) which requires the instructional staff of the public schools of the state to "Have, once every school day, readings in the presence of the pupils from the Holy Bible, without sectarian comment," invalid as being repugnant to the provisions of the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment, barring any "* * * law respecting an establishment of religion, or prohibiting the free exercise thereof * * *"?

(2) Are such provisions of the United States Constitution violated by any or all of the following practices of the appellee Dade County Board of Public Instruction:

(a) the regular reading of verses from the Holy Bible in assemblies and classrooms?

(b) the regular recitation of the Lord's Prayer and other religious and sectarian prayers?

(c) the conducting of religious and sectarian baccalaureate programs?

(d) the conducting of a religious census among the children to ascertain their own religious affiliations and the religious affiliation of their parents?

(e) the conducting of religious tests as a qualification for the employment of teachers?

(3) Is the above described statute or are any of the above described practices of the appellee Board of Public Instruction rendered constitutionally permissible by the fact that the appellee Board allows any pupil to be excused from Bible reading on the written request of his parent and permits any parent to request the release of his child from participating in any "non-academic activity" which he deems violative of his religious conscience?

Statement of the Case

These are two separate actions challenging the constitutionality of a variety of religious practices taking place in the public schools of Dade County, Florida. All the appellants are parents of children attending those schools. The appellant in one action (the Chamberlin suit) is an avowed agnostic; the appellants in the other suit (the Resnick suit) are Jewish and Unitarian. The appellees are the Dade County Board of Public Instruction and its individual members and a committee of residents of Dade County, consisting in the main of Protestant clergymen and parents of children in the public schools, who were permitted to intervene and, through their counsel, to participate in the trial as intervening defendants.

After a trial on the issues, Circuit Court Judge J. Fritz Gordon issued his decision upholding the complaint in

part and dismissing it in part (Appendix, *infra*, pp. 30a-54a). In particular, Judge Gordon upheld appellants' claim that the state and federal Constitutions were violated by sectarian comments on the Bible by public school teachers, use of school premises for after-hours Bible instruction, the exhibition of religious films and the presentation of religious programs to observe Christmas, Easter and Chanuka. Accordingly, he enjoined those practices. On the other hand, he held that no constitutional principles were violated by regular reading of the Bible* and regular recitation of the Lord's Prayer and other sectarian prayers. As to the holding of religious baccalaureate programs, the Circuit Court held that there was no evidence that they included "religious teachings" (*infra*, p. 53a). On the issue of a religious census in the schools, the Circuit Court held that there was no evidence that this was a regular practice (*infra*, p. 53a). On the matter of religious tests for teachers, the Circuit Court held that this practice could not violate any right of the plaintiffs (*infra*, p. 54a).

Appellants took an appeal to the Supreme Court of Florida from those rulings of the Circuit Court dismissing allegations of the complaints. The individual intervenors took an appeal from those rulings of the Court that upheld the complaints. However, the appellant Board of Public Instruction did not join in that appeal.

The Florida Supreme Court affirmed the lower court in all respects (*infra*, pp. 1a-29a). As to the issues raised in the appeal taken by the intervenors, the Supreme Court decided that it was unnecessary to consider those points

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* The practice of daily reading from the Bible was in accordance with the Florida statute set forth above (p. 3). The Court held the statute constitutional (*infra*, p. 46a). None of the other practices referred to were based on statute.

because the School Board, by not filing a cross appeal, had indicated its willingness to comply with the lower court's decision (*infra*, p. 27a).

On the issues raised in this appeal, the record shows as follows:

1. *Bible Reading.* The complaints charged that one of the religious practices in the Miami public schools is "the regular reading of verses from the Holy Bible in assemblies and classrooms." The answer admitted this allegation. Moreover, in response to a request for admissions, the defendant Board admitted that "a version of the Bible is being read in all or most of the public schools in Dade County" (Tr. 33). The reading is carried out pursuant to Florida Statutes, Section 231.09, set forth above.

The Bible reading is part of a daily period in the schools generally referred to by both pupils and staff as the "morning devotional," a reflection of its distinctly religious character (Tr. 84, 100, 152, 195, 232, 285-6, 1127, 1142, 1146-7, 1157-8).

The verses to be read may be taken from the Old or New Testament (Tr. 84, 107-8, 195, 247-8, 457-60). The reading is generally from the King James version of the Bible (Tr. 33). The uncontradicted testimony establishes that the King James version, which contains the New Testament, is sectarian (Tr. 657-661, 805-9, 934-7).

2. *Lord's Prayer and Other Sectarian Prayers.* Both complaints alleged the regular recitation of the Lord's Prayer. In response to the requests for admissions, the defendant Board admitted that "a religious prayer commonly known as the Lord's Prayer is regularly recited

throughout the public schools of Dade County, Florida, in the mornings coincident with the reading from the Bible" (Tr. 33).

The record shows a regular reading of the Lord's Prayer following the reading from the Bible, either over the public address system or in the individual rooms (Tr. 85, 159, 576, 1142, 1147, 1157, 1187, 1263). It is usually given in the Protestant version, that is, ending with the words "For Thine is the Kingdom," etc., which Catholics omit (Tr. 179, 198). The testimony establishes that the Lord's Prayer is sectarian (Tr. 656-7, 808-9).

Both complaints also alleged the regular recitation of "other religious and sectarian prayers." This was denied both in the answer and in the response to the requests for admissions (Tr. 33-4). Nevertheless, the uncontradicted evidence establishes that prayers other than the Lord's Prayer are recited (Tr. 198-9, 360-2, 400-3, 1213-6).

3. *Baccalaureate Services.* Both complaints alleged the conducting of religious and sectarian baccalaureate programs. The defendant Board admitted that, at the senior high schools, "a baccalaureate program is authorized • • • at which time a minister, priest, or rabbi does appear to address the assembled students." The Board stated that attendance at the services is optional and they are not held during the regular attendance time (Tr. 36-7).

The record shows that baccalaureate programs of a religious nature are "ordinary procedure" in the schools and that some of these are held on public school property and some in churches (Tr. 462-3). The program generally consists of the playing of religious music, an invocation by a minister or a rabbi, a reading from the Bible, singing

of hymns and the reciting of religious prayers, the giving of a sermon by a minister or rabbi and a benediction (Tr. 1056-7; see also 206, 1085-6). While ministers regularly appear at these services, both rabbis and Catholic priests have declined to do so (Tr. 1085-6).

The religious baccalaureate service may be combined with the graduation ceremony and the award of diplomas (Tr. 1085). Furthermore, at one high school where no class had yet graduated at the time of the trial, the school has held Award Assemblies at the end of the year at which Scholastic Awards are given (Tr. 90-1, 104-5). At these Assemblies, a minister delivers a prayer and an address or sermon (Tr. 91, 105). The student describing this ceremony stated that he was required to attend, as far as he knew, and that he had not been told that he could be excused (Tr. 91).

4. *Census.* Both complaints alleged the conducting of a religious census among the children to ascertain religious affiliations. The answer denied this allegation. The Circuit Court judges, as well as the Supreme Court of Florida, found that there was no evidence that a religious census was being conducted by the School Board (*infra*, pp. 29a, 53a). In doing so, the courts appear to have been considering the testimony concerning certain isolated classroom incidents. They apparently overlooked the unambiguous and uncontradicted testimony of the County Superintendent of Schools that all pupils are asked to state their religious preference when they enter the school system and that the answers become part of the permanent record of the pupil and are kept in the Board's central records (Tr. 451-2).

5. *Religious Tests.* Both complaints alleged the imposition of a religious test for teachers and other employees of the public school system and also the use of religious criteria in the employment and evaluation of teachers and other employees. The Board admitted that persons seeking teaching and other employment are required to answer a question on the application form as to whether or not they believe in God (Tr. 37). The Board policy requiring applicants to answer this question was put into effect in 1952 (Tr. 1039-40).

Religious affiliation is also considered in the promotions that are given under the "Career Increment Program" outlined in Plaintiff Chamberlin's Exhibit 3. Under the heading, "Cultural Attitudes," the teacher is rated on a scale of zero to four. As to religion, a rating of 4 is given if the teacher "takes part in his own religious organizations and respects other religious beliefs." He rates 3 if "he practices a religious belief and if he takes part in his own religious organizations." If he merely "conforms to his own religious belief," he rates 1. He rates zero if his evaluation "is less than" any of the "standards described above."

6. *The Issue of Voluntary Attendance.* On June 29, 1960, three weeks before the trial of this case started, the appellee Board adopted Resolution 60-21 (Plaintiff Resnick's Exhibit 2) which reads as follows:

> WHEREAS, Section 231.09(2). Florida Statutes, provides:
>
> "Duties of instructional personnel— (2) Bible Reading—Have, once every school day, readings in the presence of the pupils from the Holy Bible, without sectarian comment

and

WHEREAS, the principals of the various schools have, for many years, been instructed to release any child from participating in the daily reading of the Bible if request for his release has been made by his parent or guardian; and

WHEREAS, the Board wishes to clarify its position on these matters;

NOW, THEREFORE, BE IT RESOLVED:

1. That the Bible be read daily without sectarian comment in each of the schools in the Dade County School System.

2. Any pupil shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.

3. That if any non-academic activity in the schools be deemed by a parent or guardian to be violative of the religious conscience of such parent or guardian of any child in the public school system, that such parent or guardian shall have the right to request the release of his child from participating therein, and the various principals shall grant such request, making proper provision for the orderly care of such released children.

The record shows that the excusal policy stated in this regulation does not remove the compulsion on parent and child that is inherent in the school situation. Since, as appellees insist, the policy was in effect for many years prior to its formalization in 1960, there is ample basis in the record to see how it worked in practice. The record shows that neither pupils, parents nor teachers understood or utilized the excusal policy:

Thus, pupils artlessly testified that they were required to attend their home rooms and assemblies (Tr. 84, 86, 91, 245, 484, 487). Students testified that they had never been told of any excusal policy and faculty members testified that they had not conveyed it to parents (Tr. 84, 86, 91, 162, 733, 1123-4, 1144). A number of teachers testified that they were not aware of such a policy (Tr. 1128, 1135, 1220-2), or that it had not been conveyed to the teachers (Tr. 162-3, 164, 1173-4, 1218-20). Most striking of all, parents complaining about religious practices were not told that they could ask to have their children excused (Tr. 213-4, 572-3, 603-4, 616, 644-5, 1046, 1048-9).

Finally, there is convincing and in large part uncontradicted testimony that direct requests for leave to withdraw from morning devotionals and from religious assembly programs were not honored by school personnel (Tr. 476-7, 496-7, 510-11, 752, 758-9, 763, 778-81). As to assemblies, in particular, teachers told students that their orders were "to get everyone there" (Tr. 496, 510, 763).

How the Federal Question is Presented

The federal questions here presented were first raised in appellants' pleadings before the Circuit Court for Dade County, Florida, and their claim was denied in its opinion (*infra*, pp. 30a-54a). Appellants' claims were then presented to the Supreme Court of Florida and denied in the decision of that Court (*infra*, pp. 1a-29a).

The Questions Presented Are Substantial

The questions presented in this appeal are of direct concern to public school authorities throughout the nation. The constitutional principles involved were recently reviewed by this Court in *Engel* v. *Vitale*, 370 U.S. 421 (1962), in which it was held that the Constitution forbids the reading of a prayer as part of the exercises in a public school. That decision, in turn, was based on a number of prior decisions of this Court.

The decision of the Supreme Court of Florida in this case was handed down before this Court's decision in *Engel*. The petition for rehearing was denied after that decision. The Florida Supreme Court's rulings are basically at odds with the *Engel* decision and with the earlier decisions of this Court in all respects. As we shall show, the court below quite frankly rejected this Court's interpretation of the Federal Constitution and decided the case on the basis of its own contrary view of the First Amendment.

A. *The Constitutional Principles*

The principles laid down by this Court in applying the First Amendment guarantee of freedom of religion may be reviewed briefly. It is no longer open to question that, by virtue of the Fourteenth Amendment, the First Amendment, both in its "establishment" aspect and in its "free exercise" aspect is a restriction upon state action no less than federal action. *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *People ex rel. Everson* v. *Board of Education*, 330 U.S. 1 (1947); *People ex rel. McCollum* v. *Board of Edu-*

cation, 333 U.S. 203 (1948); *Zorach* v. *Clauson*, 343 U.S. 306 (1952); *Engel* v. *Vitale*, 370 U.S. 421 (1962). Moreover, the scope of the restriction under the amendment upon state action is no less than upon federal action. *Everson, supra; McCollum, supra.*

In *Everson*, this Court said (330 U.S. at 15-16):

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

This careful exposition of the meaning of the constitutional clause has since been repeated and reaffirmed in *McCollum*, 333 U.S. at 210-211; *McGowan* v. *Maryland*, 366 U.S. 420, 443 (1961); and *Torcaso* v. *Watkins*, 367 U.S. 488, 492-3 (1961). In addition, in *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952), this Court made it clear that "Government may not finance religious groups nor undertake

religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person."

This Court has also established beyond question that coercion is not a relevant factor under the Establishment Clause and that, consequently, religious activities in the public schools violate the constitutional prohibition of an establishment of religion even when individual pupils are permitted to absent themselves. This principle was stated unambiguously in *McCollum*, where this Court found it "unnecessary to consider" whether "the religious education program [involved in that case] was voluntary" (333 U.S., at 207n). It was restated and spelled out in *Engel*, which held that the fact that participation in the challenged prayer recitation by the students was "voluntary" could not "serve to free it from the limitations of the Establishment Clause." This Court held that that Clause "does not depend upon any showing of direct governmental compulsion" and that it was not necessary to show that the challenged laws "operate directly to coerce non-observing individuals . . ." (370 U.S. at 430).

Finally, this Court has also made it clear that religious activities in public schools cannot be defended on the ground that they are "non-sectarian." In *McCollum*, the Court found it unnecessary to reach the question whether the challenged practice of released time instruction favored one religious group over another (333 U.S. at 207n). This principle was spelled out in *Engel*, which involved a prayer that had been made as free as possible of all sectarian elements. Yet this Court held that "The fact that the prayer may be denominationally neutral" could not free it from the inhibitions of the Establishment Clause (370 U.S. at 430).

Thus, the First Amendment imposes on the states a mandate not merely of impartiality among competing faiths but also neutrality as between religion and non-religion. As this Court said in *McCollum*: ". . . a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals . . ." 333 U.S. at 211. The same thought was earlier expressed by the Court in the *Everson* case in its statement that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers . . ." 330 U.S. at 18.

B. *The Questions Here Presented*

We submit that each of the questions raised by this appeal is substantial.

(1) Appellants' claim that both daily reading from the Bible (questions 1 and 2a) and daily reading of the Lord's Prayer (question 2b) are unconstitutional has been upheld in past years by a number of state courts *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334 (1910); *State ex rel. Weiss* v. *District Board*, 76 Wisc. 177 (1890); *State ex rel. Freeman* v. *Scheve*, 65 Nebr. 853 (1902); *Herald* v. *Parish Board*, 136 La. 1034 (1915). Most recently, a three-judge federal court has twice ruled in a case in which the second appeal is now pending in this Court (October Term 1962, No. 142) that daily reading from the Bible is unconstitutional and that reading of the Lord's Prayer in connection with such daily reading is likewise unconstitutional. *Schempp* v. *School District of Abington Township*,

177 F. Supp. 398 (E.D. Pa., 1959), judgment vacated and case remanded, 364 U.S. 298, decision on remand 201 F. Supp. 815 (1962).

We submit that these practices are amply covered by the principles recently restated by this Court in *Engel* v. *Vitale*, *supra*. Here, as in *Engel*, appellees have adopted practices "wholly inconsistent with the Establishment Clause" (370 U. S. at 424). Here, as there, there can be no doubt that Bible reading and recitation of the Lord's Prayer and other sectarian prayers "is a religious activity" (*ibid.*). Neither can there be any doubt that the program as a whole "establishes the religious practice embodied in" its various aspects (*id.* at 430).

It cannot be argued that the Constitution prohibits public school programs incorporating the relatively innocuous prayer dealt with in *Engel* and yet permits programs incorporating reading from the Bible and recitation of the Lord's Prayer, practices that are not only religious but clearly sectarian, as the record here shows (*supra*, pp. 7, 8).

(2) On the matter of the religious nature of baccalaureate and other graduation ceremonies conducted by appellees (question 2c), the evidence reviewed above (pp. 8-9) establishes that they were manifestly "a religious activity" within the meaning of *Engel*. It should be noted that the trial court in this case dismissed this aspect of the complaints because there was no testimony "that at these programs *religious teachings* are resorted to by the rabbi, minister or priest" (*infra*, p. 53a) (emphasis supplied). The Supreme Court of Florida affirmed without discussing this point.

We submit that the courts below applied too narrow a test in this aspect of the case. The Constitution prohibits not only religious teaching in public schools but also religious ceremonies. There was no more "religious teaching" in the prayer recitation dealt with in *Engel* than there is in the completely religious baccalaureate services revealed by this record.

We know of no judicial decisions dealing with baccalaureate services. The one Attorney General's ruling we have found supports our view that religious baccalaureate exercises are unconstitutional. Opinion of the Attorney General of the State of Washington, April 20, 1962.

(3) On the question of a religious census (question 2d), the record shows clearly that the religion of each child is determined on his enrollment and that that information becomes a part of his file (*supra*, p. 9). We submit that appellants' claim that this practice is unconstitutional is clearly substantial.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion *or force citizens to confess* by word or act their faith therein." *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943) (emphasis supplied).

The First Amendment requires of the states more than mere neutrality on religion. It rests on the assumption that religion is not a matter of governmental concern. "The state has no *concern with* or control over the religious faith or belief of a citizen." *Gerhardt* v. *Heid*, 267 N.W. 127, 134 (1936). See also *People ex rel. Giffin* v. *Steele*,

2 Barb. (N.Y.) 397 (1848); *State ex rel. Freeman* v. *Scheve*, 65 Nebr. 853 (1902). These decisions flow inevitably from Madison's position that "religion is wholly exempt from . . . cognizance" by civil authorities. Madison's *Memorial and Remonstrance Against Religious Assessments*, annexed as an appendix to *Everson* v. *Board of Education*, *supra*.

(4) On the issue of the conducting of religious tests as a qualification for the employment of teachers (question 2e), the record establishes plainly that applicants for teaching positions are required to answer the question, "Do you believe in God?" This practice is clearly unconstitutional. *Torcaso* v. *Watkins*, 367 U. S. 488 (1961).

The trial court dismissed this aspect of the complaint on the ground that such a question did not violate any constitutional right of the plaintiffs since none of them was a teacher. The Supreme Court of Florida affirmed without specifically referring to this issue.

We believe that appellants' standing to raise this issue is established by this Court's decision in *Adler* v. *Board of Education of the City of New York*, 342 U. S. 485 (1952), in which this Court upheld the constitutionality of the New York State Feinberg Law, which made membership in organizations found to be subversive *prima facie* evidence of disqualification for employment as public school teachers. Justice Frankfurter, in a dissenting opinion, noted that the plaintiffs in the case were teachers, taxpayers and parents and argued that the appeal should have been dismissed because none of these three groups had a sufficient interest to challenge the Law (342 U. S., at 501-505). The majority of six justices did not, however, question the standing of any of the plaintiffs and decided the case on the merits.

(5) Finally, this appeal raises the question (see question 3) whether any of these religious practices is rendered constitutionally immune by the fact that parents may have their children excused from participation. As we have seen, this Court had repeatedly held that "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion" (*Engel* case, *supra*, 370 U. S. at 430).

Appellants, however, argue that the practice in question violates the Free Exercise as well as the Establishment Clause because in fact there is compulsion. The record presents ample evidence, as we have shown above (pp. 10-12), that the pupils were not in fact free to withdraw from participation.

Wholly aside from that evidence, we submit that the classroom situation inhibits a free choice in this matter. A psychiatrist (Tr. 917) and a professor of psychology (Tr. 946) so testified (Tr. 823, 865, 928-30, 953-5) and their testimony was uncontradicted. Moreover, decisions of this and other courts establish that, as Justice Frankfurter said in his concurring opinion in *McCollum* (333 U. S. at 227):

> • • • That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend • • •

This Court said in *Engel* (370 U. S. at 430):

> This is not to say, of course, that laws officially prescribing a particular form of religious worship do not

> involve coercion of such [non-observing] individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.

Accordingly, many courts have recognized that the nominal privilege of non-participation in religious practices does not eliminate the element of coercive interference with religious freedom. *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 351 (1910); *State ex rel. Weiss* v. *District Board*, 76 Wis. 177, 199-200 (1890); *Knowlton* v. *Baumhover*, 182 Iowa 691, 699-700 (1918); *Tudor* v. *Board of Education*, 14 N. J. 31, 48-50, 100 A. 2d 857 (1953), cert. denied, 348 U. S. 816 (1954).

C. *The Decision Below*

The Florida Supreme Court, we submit, decided the issues in this case in a manner totally inconsistent with the decisions of this Court described above.* It did not attempt to explain away those decisions. Instead, it rejected them.

Thus, after quoting in full the definitive and often-repeated interpretation of the Establishment Clause by this Court in *Everson*, set forth above, the court below said (*infra*, p. 6a):

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* If this Court concludes that this appeal was improvidently taken under 28 U. S. C. 1257(2) and, in accordance with 28 U. S. C. 2103, treats the appellants' papers herein as a petition for writ of certiorari, there will be ample basis for granting the petition on the ground that the Florida Supreme Court has here "decided a federal question of substance * * * in a way probably not in accord with applicable decisions of this court." Rules of the Supreme Court, Rule 19.

> We are not impressed with the language quoted as being definitive of the "establishment" clause. It goes far beyond the purpose and intent of the authors and beyond any reasonable application to the practical facts of every day life in this country. We feel that the broad language quoted must, in the course of time, be further receded from, if weight is to be accorded the true purpose of the First Amendment.

It said further (*infra*, p. 15a):

> It is beyond the realm of possibility for this court to reconcile our conception of the First Amendment with the too broad language of the several decisions relied upon by the plaintiffs.

Accordingly, the court below concluded that the meaning of the First Amendment has been "more appropriately and accurately" stated by Cooley's treatise, "Principles of Constitutional Law." Cooley, the court below concluded, "by avoidance of gymnastic semanticisms and by the application of authentic definitions to simple words has fairly approximated the intended purpose of the constitutional safeguards" (*infra*, pp. 7a, 14a).

The court likewise declined to accept the distinction made by this Court between the Free Exercise and Establishment Clauses with respect to compulsion. It said: "We find that compulsion is essential to a violation of the 'establishment of religion' clause" (*infra*, p. 15a). It subsequently said: "If the facts constitute 'establishment' of religion or restriction of the free exercise thereof it must be because there is compulsion" (*infra*, pp. 16a-17a). In this connection, the court below cited the lower court decision in the *Engel* case, subsequently reversed by this Court on this very point (*infra*, pp. 15a-16a).

Finally, the court below went on to warn against "purely philosophical invasions of the Constitution or long established and accepted customs of the vast majority of the American people * * *" and against any "doubtful judicial withdrawal of the sovereignty of the states or the traditional freedoms of the people * * *" (*infra*, p. 17a). It also deplored "* * * the trend toward the preference of minorities over the majority and toward the requiring of the majority which seem never to suffer psychological trauma, to yield up its cherished customs and rights" (*infra*, p. 22a). The Florida Supreme Court appears to have misconceived both the nature of the federal-state relationship and the purpose of constitutional guarantees designed to guard against abuse of governmental powers.

Conclusion

The federal questions presented by this appeal are substantial and of public importance. It is therefore respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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October, 1962

APPENDIX A

(Opinion Filed June 6, 1962)

IN THE

SUPREME COURT OF FLORIDA

January Term, A. D. 1962

Case No. 31,545

HARLOW CHAMBERLIN, on his own behalf and in behalf of all other persons similarly situated,

Appellant,

vs.

THE DADE COUNTY BOARD OF PUBLIC INSTRUCTION, *et al.*,

Appellees,

vs.

DAVID HUME, *et al.*,

Intervening Appellees.

Case No. 31,546

EDWARD RESNICK, PHILIP STERN, and ELSIE THORNER, in their own behalf, and in behalf of all other persons similarly situated,

Appellants,

vs.

THE DADE COUNTY BOARD OF PUBLIC INSTRUCTION; *et al.*,

Appellees,

vs.

DAVID HUME, *et al.*,

Intervening Appellees.

CALDWELL, J.

These two cases are here upon direct appeal from a final decree of the circuit court of Dade County construing

controlling provisions of the federal and state constitutions, ruling upon the validity of a state statute and upon certain complaints hereinafter discussed.

Harlow Chamberlin, on his own behalf and in behalf of all other persons similarly situated, a plaintiff below, appellant here, and Edward Resnick, Philip Stern and Elsie Thorner, in their own behalf and in behalf of all other persons similarly situated, plaintiffs below, appellants here, brought separate actions against the Dade County Board of Public Instruction, appellee here, to enjoin certain alleged religious practices in the Dade County public schools, praying that Section 231.09, F. S. A. be declared to be in violation of the First and Fourteenth Amendments to the United States Constitution and Sections 5 and 6 of the Declaration of Rights of the Florida Constitution. Neither suit alleged specific acts as being in violation of Section 5 of the Declaration of Rights of the Florida Constitution.

Both complaints seek relief by way of injunction and declaratory judgment and, as to the specific acts asserted to be in violation of the federal and state constitutions, they are identical.

The chancellor found that both cases involved similar issues and prayers for relief and consolidated them for the purpose of trial. A single brief is submitted in this appeal on both cases.

The plaintiff in the Chamberlin suit is an agnostic and the plaintiffs in the Resnick complaint are Jewish and Unitarian. The defendants in both suits are the Dade County Board of Public Instruction and its individual members.

In both actions, certain individuals, consisting in the main of clergymen and parents of children in the public

schools, were permitted by the court to intervene as defendants.

In substance, the complaints allege that, in the public schools, the defendant observes the following practices:

Regular reading of the Bible; comments on the Bible; distribution of sectarian literature to school children; after hours Bible instruction; regular recitation of the Lord's Prayer, grace and other sectarian prayers; singing of religious hymns; religious observance of the Christmas, Hannukka and Easter holidays, including instruction in the dogma of the Nativity and Resurrection; display of religious symbols, baccalaureate programs; conducting a religious census and the use of religious tests for employment and promotion of school employees.

After a prolonged trial and the taking of some 1400 pages of testimony, the chancellor enjoined: Sectarian comments on the Bible by public school teachers; the use of school premises after school hours for Bible instruction; the exhibition of films with religious content and the religious observance in the public schools of Christmas, Easter and Hannukka holidays.

The chancellor rejected the complaints alleging: The reading of the Bible; the distribution of sectarian literature to school children; the recitation of the Lord's Prayer, grace and other sectarian prayers; the singing of religious hymns; the display of religious symbols; baccalaureate programs; the conducting of a religious census and the use of religious tests for employment and promotion of school employees, all upon grounds hereinafter discussed.

The plaintiffs allege that the defendants by their conduct in the public school system of Dade County are in violation of the First and Fourteenth Amendment to the United States Constitution and Sections 5 and 6 of the

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Declaration of Rights of the Florida Constitution, the pertinent language of which is in the footnote.[1]

The plaintiffs contend that attendance upon or participation in the complained of religious practices is in violation of both the "establishment" and the "free exercise" clauses of the constitutional language above quoted, regardless of whether the alleged practices are sectarian or non-sectarian. Also, notwithstanding the resolution of the Dade County Board of Public Instruction[2] which required

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1. The First Amendment to the United States Constitution provides in part:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *"

The Fourteenth Amendment to the United States Constitution provides in part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 5 (in part) and Section 6 of the Declaration of Rights of the Florida Constitution provide as follows:

"Section 5. Religious freedom; liberty of conscience, etc.—The free exercise and enjoyment of religious profession and worship shall for-ever be allowed in this State. * * *"

"Section 6. Religious preferences; public aid, etc.—No preference shall be given by law to any church, sect or mode of worship and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution."

2. "1. That the Bible be read daily without sectarian comment in each of the schools in the Dade County System.

2. Any pupil shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent, or guardian.

3. If any non-academic activity in the schools be deemed by parent or guardian to be violative of the religious conscience of such parent, or guardian, of any child in the public school system, that such parent, or guardian shall

the school principal to excuse children from attendance upon request of their parents or guardians, the plaintiffs contend that the exclusion of expert testimony offered for the purpose of showing psychological compulsion and the effects thereof upon the school children was error.

The plaintiffs lean heavily upon the Everson,[3] McCollum,[4] McGowan[5] and Torcaso[6] cases for support and make much of the fact that in those cases, the court, defining the "establishment" clause, used this language:[7]

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining

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have the right to request the release of his child from participating therein, and the various principals shall grant such request, making proper provision for the orderly care of such released children." (Resolution 60-21, adopted June 29, 1960)

3. People ex rel Everson vs. Board of Education, 330 U. S. 1, 91 L. ed. 711, 67 S. Ct. 504 (1946).

4. People ex rel McCollum vs. Board of Education, 333 U. S. 203, 92 L. ed. 646, 68 S. Ct. 461 (1948).

5. McGowan vs. Maryland, 366 U. S. 420, 6 L. ed. 2d 393, 81 S. Ct. 1101 (1961).

6. Torcaso vs. Watkins, 367 U. S. 488, 6 L. ed. 2d 982, 81 S. Ct. 1680 (1961).

7. People ex rel Everson vs. Board of Education, 330 U. S. 1, 15-16, 91 L. ed. 711, 723, 67 S. Ct. 504, 511 (1946); People ex rel McCollum vs. Board of Education, 333 U. S. 203, 210-11, 92 L. ed. 649, 658, 68 S. Ct. 461, 464 (1948); McGowan vs. Maryland, 366 U. S. 420, 443, 6 L. ed. 2d 393, 409, 81 S. Ct. 1101, 1114 (1961); Torcaso vs. Watkins, 367 U. S. 488, 493, 6 L. ed. 2d 982, 986, 81 S. Ct. 1680, 1682 (1961).

or professing religious beliefs, or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' "

We are not impressed with the language quoted as being definitive of the "establishment" clause. It goes far beyond the purpose and intent of the authors and beyond any reasonable application to the practical facts of every day life in this country. We feel that the broad language quoted must, in the course of time, be further receded from, if weight is to be accorded the true purpose of the First Amendment. The quotation imputed to Jefferson, written by him ten years after the adoption of the First Amendment in a letter to the Danbury Baptists of Connecticut,[8] has done little other than cause confusion.

The University of Virginia, wholly controlled by the State of Virginia, by regulation suggested by Mr. Jeffer-

8. Reply to Greetings from Committee of the Danbury Baptist Ass'n of Connecticut, January 1, 1802; see Reynolds vs. U. S., 98 U. S. 145, 164, 25 law ed. 244, 249 (1878):

"Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the Government reach actions only, and not opinions, I contemplate with Sovereign reverence that act of the whole American people which declared that their Legislature should 'make no law respecting an establishment of religions or prohibiting the free exercise thereof', thus building a wall of separation between Church and State."

son and adopted by the Visitors of the University provided that the students would be expected to attend religious worship.[9] As was pointed out by Mr. Justice Reed in the McCollum case:[10]

> "Thus, the 'wall of separation between church and State' that Mr. Jefferson built at the University which he founded did not exclude religious education from that school. The difference between the generality of his statements on the separation of church and state and the specificity of his conclusions on education are considerable. A rule of law should not be drawn from a figure of speech."

It is our view that Cooley more appropriately and accurately states the proposition as follows:[11]

> "By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others. It was never intended by the Constitution that the government should be prohibited from recognizing religion * * * where it might be done without drawing any invidious dis-

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9. C. II, §1 of the Regulations of the University of October 4, 1824:

> "Should the religious sects of this State, or any of them according to the invitation held out to them, establish within, or adjacent to, the precincts of the University, schools of instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their School in the University at its stated hour."

See, Randall, *Life of Thomas Jefferson*, Vol. 3, p. 470 (1858).

10. Illinois ex rel McCollum v. Board of Education, 333 U. S. 203, 247, 92 L. ed. 649, 677, 68 S. Ct. 461, 482 (1947).

11. Cooley, *Principles of Constitutional Law*, 213-14 (2nd ed. 1891).

tinctions between different religious beliefs, organizations or sects.

The Christian religion was always recognized in the administration of the common law; and so far that law continues to be the law of the land, the fundamental principles of that religion must continue to be recognized in the same cases and to the same extent as formerly."

If Thomas Jefferson is to be regarded as an authority on the subject, and we concede the point, we believe his opinion, touching the manner in which the Constitution should be construed, expressed in a letter written on June 12, 1823, to William Johnson[12] is more pertinent to the problem before us than is the one quoted above, as taken from the McCollum case:

"On every question of construction, [let us] carry ourselves back to the time when the constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed."

Mr. Justice Jackson in the Zorach[13] case, referring to Mr. Jefferson's "wall", had this to say:

"A number of Justices just short of a majority of the majority that promulgates today's passionate dialectics joined in answering them in Illinois ex rel McCollum vs. Board of Education, 333 U. S. 203, 92 L. ed. 648, 68 S. Ct. 461, 2 A. L. R. 2d 1338. The distinction

12. Ford, *The Writings of Thomas Jefferson*, Vol. 10, p. 231 (1899).

13. Zorach vs. Clauson, 343 U. S. 306, 325, 96 L. ed. 954, 968, 72 S. Ct. 679, 689 (1951).

attempted between that case and this is trivial, almost to the point of cynicism, magnifying its non-essential details and disparaging compulsion which was the underlying reason for invalidity. A reading of the Court's opinion in that case along with its opinion in this case will show such difference of overtones and undertones as to make clear that the McCollum case has passed like a storm in the teacup. *The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected. Today's judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law.*" (Emphasis supplied)

And later, in Saia vs. New York[14] in pointing up the confused state of affairs adduced by the several decisions on the question, Mr. Justice Jackson, in his dissent, said:

"* * * Only a few weeks ago we held that the Constitution prohibits a state or municipality from using tax-supported property 'to aid religious groups to spread their faith'. Illinois ex rel McCollum vs. Board of Education, 333 U. S. 203, ante, 648, 68 S. Ct. 461. Today we say it compels them to let it be used for that purpose. In the one case the public property was appropriated to school uses; today it is public property appropriated and equipped for recreational purposes * * * And I cannot see how we can read the Constitution one day to forbid and the next day to compel use of a public tax-supported property to help a religious sect spread its faith."

14. 334 U. S. 558, 569-70, 92 L. ed. 1574, 1582, 68 S. Ct. 1148, 1154 (1947).

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Mr. Justice Desmond, in his concurring Court of Appeals opinion in Zorach vs. Clauson,[15] said:

> "One of the curiosities of history is the enlarged and distorted meaning currently being given, by some, to the simple phrase of the First Amendment: 'an establishment of religion'. It must be the rule as to constitutions, just as to statutes, that there is 'no occasion for construction' when the phrasing 'is entirely free from ambiguity' * * *"

In State v. Butler[16] the Supreme Court of Florida said:

> "A Constitution is not to be made to mean one thing at one time and another at some subsequent time, when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable * * * Where a particular construction has been generally accepted and acted upon, and especially when this has occurred contemporaneously with the adoption of the Constitution, and by those who had opportunity to understand the intention of the instrument, a strong presumption exists that the construction rightly interprets the intention."

In Carden vs. Bland[17] the Supreme Court of Tennessee refused to enjoin the reading of the Bible and the singing of religious hymns in the public schools and said:

> "In order to wipe out any and all right of the State to control their own system of public education great stress is laid upon the need of maintaining the doctrine of 'Separation of Church and State'. We con-

15. 303 N. Y. 161, 179, 100 N. E. 2d 463, 472 (1951).

16. 70 Fla. 102, 134, 69 So. 771, 780 (1915).

17. 199 Tenn. 665, 678, 288 S. W. 2d 718, 724 (1956).

cede that this is important. But it should not be tortured into a meaning that was never intended by the Founders of this Republic, with the result that the public school system of the several states is to be made a Godless institution as a matter of law."

Reviewing the McCollum and Everson cases, the court said:[18]

"As we view these decisions the conclusions reached are irreconcilable."

In Negel vs. Vitale[19] the court approved this language:

"'We are a religious people whose institutions' presuppose a Supreme Being' * * * As Justice Bedlock of the Appellate Division wrote in this case: 'The contention that acknowledgments of and references to Almighty God are acceptable and desirable in all other phases of our public life but not *in our public schools*, is, in my judgment, an attempt to stretch far beyond its breaking point the principle of separation of church and State and to obscure one's vision to the universally accepted tradition that our is a Nation founded and nurtured upon belief in God'. [11 A. D. 2d 340, 206 N. Y. 2d 188]"

The United States Supreme Court in Rector, Etc., of Holy Trinity Church vs. United States,[20] after reviewing many authorities, constitutions and historical documents, held:

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18. Ibid.

19. 10 N. Y. 2d 174, 178, 176 N. E. 2d 579, 581 (1961).

20. 143 U. S. 457, 470, 36 L. ed. 226, 231, 12 S. Ct. 511, 516 (1891).

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"There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation." (Emphasis supplied)

In the Doremus v. Board of Education[21] case it was said:

> "While it is necessary that there be a separation between church and state, it is not necessary that the state should be stripped of religious sentiment • • • Our way of life is on challenge. Organized atheistic society is making a determined drive for supremacy by conquest as well as by infiltration. Recent history has demonstrated that when such a totalitarian power comes into control it exercises a ruthless supremacy over men and ideas, and over such remnants of religious worship as it permits to exist. We are at a crucial hour in which it may behoove our people to conserve all of the elements which have made our land what it is."

The concept of God has been and is so interwoven into every aspect of American institutions that to attack this concept is to threaten the very fiber of our existence as a nation. In Wilkerson vs. City of Rome,[22] the Supreme Court of Georgia discussing the background of the doctrine of separation of Church and State in this country stated:

> "[U]nder the leadership of Roger Williams of Rhode Island, the movement for the separation of Church and State proceeded with ever increasing volume and strength. It should be clearly understood, however,

21. 5 N. J. 435, 451-52, 75 A. 2d 880, 888 (1950), App. dismissed 342 U. S. 429, 96 L. ed. 475, 72 S. Ct. 394 (1951).

22. 152 Ga. 762, 769, 110 S. E. 895, 899 (1922).

that this was not a movement for the separation of state from Christianity, but specifically a separation of church and State. Christianity entered into the whole warp and woof of our governmental fabric. Many of the statesmen of this country treated Christianity as a part of the law of the land."

By the Declaration of Independence, the Colonies asserted "certain unalienable rights" with which all men were "endowed by their Creator", and appealed "to the Supreme Judge of the world for the rectitude of our intentions." After the Revolution, the treaty exacted from Great Britain begins with these words:[23] "In the name of the Most Holy and Undivided Trinity." In the light of these historic facts, can it be said that reference to the Scriptures or recognition of the Deity in our public schools is in violation of the constitutional rights of any person?

We think it significant that the federal government, in keeping with out traditional public recognition of religion and in harmony with Cooley's construction of the "establishment" clause has: Provided chaplains for both Houses of Congress who daily invoke Divine blessings upon the meetings; commissioned chaplains for the Armed Forces who employ for religious purposes property belonging to the United States but dedicated to the cause of religions; approved the opening exercises of the public schools in the District of Columbia, a creature of the federal government, which exercises include a reading from the Bible and the Lord's Prayer; approved the requirement by the United States Naval and Military Academies of compulsory attendance of the Cadets at Sunday church services, presided over by chaplains paid by the United

23. Definitive Treaty of Peace with His Britannic Majesty, Sept. 3, 1783. *Public Treaties of U. S. in force on December 1, 1873*, 18 Stat. 266 (1875).

States Government and held in property owned by the government; authorized the flying of the church flag above or to the right of the national flag during church services conducted at sea by navy chaplains; required the President and Members of Congress, the Justices of the United States Supreme Court to subscribe to an oath in which the aid of Deity is invoked; inscribed the words "In God We Trust" upon the currency of the nation; designated a national anthem which proclaims the Deity; approved, along with the several states, the exemption of multiplied millions of dollars worth of church property from taxation.

In countless other instances the federal government accepts religion as an ever present fact without suggesting violation of the "establishment" and "free exercise" clauses which, we believe, have been tortured beyond the intent of the Authors.

It seems to us that Cooley, acclaimed as the foremost authority on the Constitution as it was in his time, by avoidance of gymnastic semanticisms and by the application of authentic definitions to simple words has fairly approximated the intended purposes of the constitutional safeguards.[24]

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24. See footnote 11, supra; see also, Schofield, *Constitutional Law and Equity*, Vol. 2, p. 460-65 (1921); Story, *The Constitution*, Vol. 2, pp. 630-31 (5th ed. 1891):

> "Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration, the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation * * * But the duty of supporting religion, and especially the Christian religion, is very different from the right to force the consciences of other men or to punish them for worshipping God in the manner which they believe their accountability to him requires * * *"

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It is beyond the realm of possibility for this court to reconcile our conception of the First Amendment with the too broad language of the several decisions relied upon by the plaintiff. Nor have we been able to reconcile the several retreats, modifications and hair-splitting distinctions written in those opinions and made to accommodate varying statements of facts. We, therefore, adopt for our guidance, Cooley's definition of the "establishment" clause as quoted above and, in doing so, we are mindful of the rule laid down and stated many times by the Supreme Court of the United States:[25]

> "• • • [T]he public interests imperatively demand that legislative enactment be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, *beyond all question*, in violation of the fundamental law of the Constitution." (Emphasis ours)

The plaintiffs insist that each of the challenged practices violates not only the "establishment" but, also, the "free exercise" clause. For the purposes of immediate consideration we find that compulsion is essential to a violation of the "establishment of religion" clause, and that, as to the facts before us, it is not necessary that the "establishment" and "free exercise" guarantees be treated separately. If the offenses complained of conflicts with the safeguards provided by the Constitution, it must be because there is present compulsion requiring unwilling support of religion, in whatever its form.

Justice Meyer in the Engel[26] case, discussing compulsion, used this pertinent language:

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25. Atkin vs. Kansas, 191 U. S. 207, 223, 48 L. ed. 148, 158, ——— S. Ct. ——— (1903).

26. Engel v. Vitale, 191 N. Y. 2d 453, 491-92, 493 (1959); aff'd 10 N. Y. 2d 174, 176 N. E. 2d 579 (1961).

"• • • In any event, to the extent that petitioners seek to rely on the pressure resulting from the school's apparent sanction of prayer and from the necessity of applying for release from the exercise, as distinct from overt acts of the teachers or other school authorities, the evidence would not be material. To recognize 'subtle pressures' as compulsion under the Amendment is to stray far afield from the operations the Amendment was designed to prevent • • •" "• • • [D]ivisiveness and consciousness of religious differences have not been raised to the level of constitutional absolutes • • •"

In this case the basic facts are that Florida Statute, §231.09[27] requires the daily reading of the Bible without sectarian comment. Moreover, the record shows that by appropriate regulation the Dade County Board of Public Instruction requires that pupils be excused from attending upon request by the parents or guardians. Our problem is to determine whether the practices complained of violate the constitutional safeguards. If the facts consti-

27. Florida Statute, Section 231.09 (1961):
"Duties of instructional personnel.—Members of the instructional staff of the public schools, subject to the rules and regulations of the state board and of the county board, shall perform the following functions: (1) TEACHING.—Teach efficiently and faithfully using the books and materials required, following the prescribed courses of study, and employing approved methods of instruction, the following: the essentials of the United States constitution, flag education, including proper flag display and flag salute, the elements of civil government, the elementary principles of agriculture, the true effects of all alcoholic and intoxicating liquors and beverages and narcotics upon the human body and mind, kindness to animals, the history of the state, conservation of natural resources, and such additional materials, subjects, courses, or fields in such grades as may be prescribed by law or by regulations of the state board and county board in fulfilling the requirements of law; provided, that state and county

tute "establishment" of religion or restriction of the free exercise thereof it must be because there is compulsion. If the pupils are compelled to attend upon the practices cited, or if their free exercise of religion is otherwise circumscribed, then we must conclude there is a violation of the "establishment" and "free exercise" safeguards.

We think it necessary that, unless otherwise clearly commanded by the plain language of the statutes or the Constitution, the courts refrain from purely philosophical invasions of the Constitution or long established and accepted customs of the vast majority of the American people. The recurrent whittling away of the bedrock foundations of our society can be nothing short of destructive of free government. Every doubtful judicial withdrawal of the sovereignty of the states or the traditional freedoms of the people weakens the fabric of the nation and the confidence of its citizens. If the Constitution be wrong it should be corrected by amendment and not judicial usurpation.[28]

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officials shall furnish and put into execution a system and method of teaching the true effects of alcohol and narcotics on the human body and mind, provide the necessary textbooks, literature, equipment, and directions, see that such subjects are efficiently taught by means of pictures, charts, oral instruction, and lectures and other approved methods, and require such reports as are deemed necessary to show the work which is being covered and the results being accomplished, and provided further, that any child whose parent shall present to the school principal a signed statement that the teaching of disease, its symptoms, development and treatment, and the viewing of pictures or motion pictures of such subjects conflict with the religious teachings of their church, shall be exempt from such instruction, and no child so exempt shall be penalized by reason of such exemption. (2) BIBLE READING.—Have, once every school day, readings in the presence of the pupils from the Holy Bible, without sectarian comment. (3) * * *"

28. Washington's Farewell Address, September 16, 1776:

"The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the

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As was stated by the Circuit Court of Appeals opinion in the Zorach case:[29]

"One of the curiosities of history is the enlarged and distorted meaning currently being given, by some, to the simple phrase of the First Amendment: 'an establishment of religion'. It must be the rule as to constitutions, just as to statutes, that there 'is no occasion for construction' when the phrasing 'is entirely free from ambiguity' (Wright vs. United States, 302 U. S. 583, 589) * * * The language of a constitution is to be given its ordinary meaning (Wright vs. United States and Matter of Carey vs. Morton, supra). The fundamental purpose in construing it is to ascertain and give effect to the intent of the framers and of the people who adopted it, keeping in mind the object sought to be accomplished and the evils sought to be prevented or remedied. Under any and all of those rules and tests (and they are all one), what is the meaning of 'an establishment' of religion? The Supreme Court itself gave us an answer in Cantwell vs. Connecticut, (310 U. S. 296, 303). 'It forestalls compulsion by law of the acceptance of any creed or practice of any form of worship'. 'Established' churches were well known to the colonists, who had experienced them in Europe and America. They know that the phrase meant 'a State church', such as, for instance,

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form of government, a real despotism * * * If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designated. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed."

29. Zorach vs. Clauson, 303 N. Y. 161, 179, 100 N. E. 2d 463, 472 (1951).

existed in Massachusetts for more than 40 years after the adoption of the Constitution. (Corwin, Constitution and What It Means Today, [9th ed.] pp. 155-156)."

It is of interest here that the United States Supreme Court decision in the Zorach case makes it clear that the First Amendment does not say there must be in every and all respects a separation of church and state.[30] Rather the First Amendment defines the manner and specific way in which there shall be no concert, or union, or dependency, one on the other. The court held that to be "the common sense of the matter" and that, otherwise, the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly; that prayers in our Legislative Halls; appeals to the Almighty by the Chief Executives; the words "So Help Me God" in our courtroom oaths; the supplication with which the Supreme Court of the United States opens each session, "God save the United States and this Honorable Court," could be held objectionable.[31]

In the light of this reasoning in the Zorach case the court held that the public schools of New York City, upon written request of the parents, were permitted to release, during the school day, those students who wished to attend religious exercises held outside the school building. The court found that it was proper that the school board assemble the students upon school property and, during the school day, excuse them from attendance upon classes of regular and secular instruction by teachers and in classrooms provided at public expense. The time of the teachers and the use of the classrooms, the utlities and conveniences, made available at public expense, were not, in the

30. Zorach vs. Clauson, 343 U. S. 306, 312, 96 L. ed. 954, 961, 72 S. Ct. 679, 683 (1951).

31. Ibid.

absence of such released students, put to use and represented, in actual fact, albeit by indirection, public tax funds expended in aid of religion. But the infringement was thought by the court to be inconsequential and therefore permitted under the Constitution.

In principle there is no substantial difference between the excusing of the Zorach students who wished to attend religious exercises elsewhere and the excusing of the Dade County students who do not wish to hear the Bible read in school. And, in substance, there is no difference in principle between the three and five minutes' use of Dade County public school facilities for the reading of the Bible to those who wish to hear it and the non-use, during school hours, of such facilities in Zorach while those who wish religious instruction elsewhere are excused from the premises. To beg the question between the facts in Zorach and the instant case is to engage in cynical trivialities.

It does not appear by the pleadings and testimony that there is any serious contention that the children of the plaintiffs have suffered or will suffer any measurable psychological trauma as a consequence of the reading of the Bible, either in or out of their presence. Rather, it seems that this is just another case in which the tender sensibilities of certain minorities are sought to be protected against the allegedly harsh laws and customs enacted and established by the more rugged pioneers of the Nation. In the instant case we are told that the primary objects of solicitude are the children of the plaintiffs, atheists, Unitarians and Jews, which children, although not required to be present at the time, will, so it is said, suffer some supposedly irreparable emotional stress if their classmates are permitted to hear the Bible read. It seems more likely that the children in question are the unwitting victims of a quasi-political contest.

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The plaintiffs assume, inferentially at least, that minorities enjoy a peculiar susceptibility to psychological and emotional trauma and compulsions and are entitled to some peculiar and fatherly protection against the strange ways of the ordinary American citizen. But such is not the case. The minority is entitled to enjoy the same privileges and the same justice as are enjoyed by people generally as an inherent right. The minority and the majority are both denied the privilege of disrupting the lives of others because of some hypersensitivity or fractious temperament.[32]

To say that the vast majority of students in the Dade County public school system are to be foreclosed of the privilege of living a few moments each day with the words of the Bible, the greatest of all literature, or of observing in the classroom, if such were possible, the magnificent painting of the Last Supper, or of listening to Caruso's recording of Adeste Fidelis, because a minority might suffer some imagined and nebulous confusion, is to approach the ridiculous.

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32. See Engel vs. Vitale, 191 N. Y. 2d 453, 487 (1959), aff'd 10 N. Y. 2d 174, 176 N. E. 2d 579 (1961):

"Every individual has a constitutional right personally to be free from religion, but that right is a shield, not a sword, and may not be used to compel others to adopt the same attitude."

Doremus vs. Board of Education, 5 N. J. 435, 451, 75 A. 2d 880, 887 (1950) app. dismissed 342 U. S. 429, 96 L. ed. 475, 72 S. Ct. 345 (1951):

"Again, take the instance of an atheist:—he has all the protection of the constitution; he may not be held to any religious function or to the support, financial or otherwise, of a religious establishment; he may entertain his belief or the lack of belief as he will; but he lives in a country where theism is in the warp and woof of the social and the governmental fabric and he has no authority to eradicate from governmental activities every vestige of the existence of God. He could not, we hypothesize, prevent, on constitutional grounds, the houses of Congress from opening their sessions with prayer to the Almighty for guidance in their deliberations, even though he were a Member of Congress * * *".

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We believe it necessary that public education give due recognition to the place of religion and the culture and convictions of our people but that in doing so the principle of separation of church and state must be safeguarded. The road is a difficult one but, certainly, we cannot agree that banishing the Bible and music and paintings of religious connotation will benefit the plaintiffs' children in any material way. We are of the opinion that erasing the influence of the best literature, music and art and gentler aspects of American life in general would be to create an anti-religious attitude in the schools and substantially injure the well being of the majority of the school children. And although it may be urged that to take such drastic action is to incur the good will of the nation's enemy we think the cost too great and the proposal ill-founded in law.

We are sensible of the extent to which the sophistries of agnosticism have gained credence. And we acknowledge the trend toward the preference of minorities over the majority and toward the requiring of the majority which seem never to suffer psychological trauma, to yield up its cherished customs and rights. Although we concede the duty to turn the other cheek to the enemy and to deal gently with the weak, we do not agree that it is our function to subvert the purpose and intent of the Constitution to those ends, nor do we feel impelled to indulge in flights of fanciful philosophy. When we subscribed to our official oaths it was with "no mental reservations and with no purpose to construe the Constitution by any hypercritical rules."[33]

For all practical purposes there are now in the world just two forms of government, loosely denominated Democracy and Communism. The vital difference between the two is that the Democracies accept religion and guarantee its free exercise, in one form or another, as part of the day

33. Lincoln, First Inaugural Address, March 4, 1861.

to day lives of their people, whereas Communism has banished religion, except as it may be bootlegged in the dark and inhospitable corners. A consequential distinction, as the major difference is applied to these United States, is that here we prohibit the governmental establishment of religion but guarantee to all the free exercise thereof while, under Communism, religion is denied and those who profess religion are hounded underground.

We feel it equally imperative that we preserve the safeguards of the Constitution against all violations of the "establishment" and "free exercise" clauses and, at the same time, preserve those clauses and the rights of the States and the people thereunder against weasel-worded constructions and distinctions designed to impute to them either more or less than was originally intended. But typical of the American custom of meeting the other side more than half way, is the paradox of the appellee school board insuring the free exercise of religion while, by mandatory statute,[34] it must teach the history, doctrines, objectives and techniques of Communism. Thus the school board affords the atheists the freedom of hearing or not hearing the Bible read while it requires that all students, without choice, be taught the facts of Communism, the antithesis of the Bible.

In the Everson case,[35] the courts held it should not strike the New Jersey statute if it is within the state's constitutional power, even though it approaches the verge of that power. The statute there in question was one which authorized the State of New Jersey to pay from public funds the cost of transporting students to parochial schools. It was held not in violation of the "establishment of religion" clause.

34. Florida Statute, §230.23(4)(l) (1961).

35. People ex rel Everson vs. Board of Education, 330 U. S. 1, 91 L. ed. 711, 67 S. Ct. 504 (1946).

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The Court sustained its reasoning by its understanding of the meaning of the language written into the Bill of Rights as reflected by its review of the background and environment of the period in which such language was fashioned and adopted. In that review, it was found that early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support government favored churches at a time filled with turmoil, civil strife, and persecution, generated in large part by established sects determined to maintain their absolute political and religious supremacy. It was shown that Catholics persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all these had from time to time persecuted Jews; that whatever religious group happened at the moment to be in league with the government had contributed to the fining, the casting in jail, the torturing and killing of men and women. Dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith; that such practices became so commonplace as to shock the freedom loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches aroused indignation. It was these feelings which found expression in the First Amendment.[36]

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36. Story, *The Constitution*, Vol. 2, pp. 631-32 (5th ed. 1841): "The real object of the amendment was * * * to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cuts off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age."

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The court, in the Everson case,[37] quoted with approval the language of Watson vs. Jones:[38]

> "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand it has secured religious liberty from the invasion of civil authority."

The court held that, notwithstanding the First Amendment, New Jersey could spend tax raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It was obvious that such payments materially helped children to get to church schools and, equally obvious, there was the possibility that some of such children might not be sent to church schools if the parents were compelled to pay the cost of transportation. The court agreed that the First Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers, but that it does not require the state to be their adversary. It was held that, although the First Amendment has erected a wall between church and state, the New Jersey act did not breach that wall.

An examination of the Everson, Zorach and McCollum cases[39] convinces us of the practical impossibility of drawing distinctions between nebulosities. The purpose of the First Amendment was to prevent the abuses prevalent prior to and at the time of its adoption. There is no occasion to strain at gnats in the cause under consideration. There is or there is not a violation of the substantial meaning

37. Id. at 15, 723, 511.

38. 80 U. S. (13 Wall.) 679, 730, 20 L. ed. 666, 677 (1812).

39. Footnote, 7, supra.

of the "establishment" clause and the "free exercise" clause. We see no profit in a tweedle-dee, tweedle-dum uncertainty in which the complete and uncompromising separation of church from state is argued but the exception is allowed, nor the sort of indecisiveness thought by Justice Jackson[40] to be best typified by Byron's Julia who "whispering 'I will ne'er consent,'—consented."[41]

The reasoning in the McCollum case does not convince us there was error in the chancellor's findings here. There, the local Board of Education approved the giving of religious instruction in the schools under a "released time" arrangement pursuant to which outside teachers furnished by a religious council conducted the classes. The court held the arrangement to be in violation of the constitutional separation of church and state. Mr. Justice Jackson, concurring in the majority opinion,[42] questioned whether the circumstances of the case established jurisdiction in the Supreme Court, maintaining that jurisdiction was not conferred by the fact that the complaining child was humiliated by not joining others in attendance upon such classes and holding that, although the Constitution protects the right to dissent, it cannot be construed to protect one from embarrassment which attends non-conformity, whether in religion, politics, behavior or dress; that since no legal compulsion was applied to the complainant's son himself and no penalty was imposed or threatened from which the court might relieve him, jurisdiction could not be based upon that ground.

Mr. Justice Jackson also pointed to the fact that the cost of the plan complained of was incalculable and neg-

40. Everson vs. Board of Education, 330 U. S. 1, 19, 91 L. ed. 711, 725, 67 S. Ct. 504, 513 (1946).

41. Byron, *Don Juan*, Canto i, st. 117.

42. People ex rel McCollum vs. Board of Education, 333 U. S. 203, 232, 92 L. ed. 649, 669, 68 S. Ct. 461, 475 (1948).

ligible, neither substantial nor measurable; that if we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds; but nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant lawsuits; that it would not seem practical to teach either practice or appreciation of the arts if we are to forbid the exposure of youth to any religious influences. Music without sacred music, architecture without the cathedrals, or paintings without the Scriptural themes would be eccentric and incomplete, even from a secular point of view; that, "one can hardly respect a system of education that would leave the student wholly ignorant of the occurence of religious thought that moved the world society for a part in which he is being prepared."[43] The facts, the reasoning and the findings of the McCollum case, convince us of the need to establish limitations beyond which cavilling and nit-picking complaints will not be considered. Those limitations must be drawn in broad and substantial lines which eliminate fine distinctions, hyper-sensitivities and questionable jurisdictional fact.

The intervening appellees, by their cross appeal, purported to raise for this Court's consideration the correctness of the chancellor's decree enjoining certain activities. In view of the fact that the school board, by not filing a cross appeal, has acceded to and indicated its willingness to comply with that portion of the chancellor's decree, we find it unnecessary that we consider the point raised by the intervening appellees.

We have thus far limited our treatment of the merits of this cause to what we conceive to be the pivotal issue herein, the constitutionality of the statute requiring daily read-

43. Id at 236, 671, 477.

ings from the Holy Bible. The appellants have raised, and we have considered, a number of points relating to other religious practices allegedly being carried on in the public schools of Dade County, which the chancellor refused to enjoin.

It is our opinion that the legal issues raised in connection with these other points have been disposed of adequately by the foregoing consideration of the Bible readings. The principles governing the recitation of the Lord's Prayer, the singing of religious hymns and the holding of baccalaureate programs are much the same as those applicable to the reading of the Bible. It is our conclusion that such practices of the appellee school board are so conducted as not to infringe the constitutional safeguards enjoyed by appellants.

The appellant's prayer to enjoin the display of religious symbols in the schools was denied by the chancellor "• • • upon the ground that the religious displays were found by this court to be works of art created by the school children and were displayed on a temporary basis and not of a permanent nature." It is our opinion that this holding of the chancellor is well grounded both in fact and in law. This issue, moreover, serves to point up the delicate balance of rights involved in a case of this nature. Are school children to be forbidden from expressing their natural artistic talents through media including religious themes? Or, are the results of their efforts to be excluded from public display and recognition merely because they choose to adopt a religious, rather than a secular subject? The answer should be obvious. To impose such a restriction would more nearly approach a restraint upon the free exercise of religion than does the present practice of the school board in permitting such displays.

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The chancellor found that there was no factual basis for the appellant's allegations regarding a religious census of school children and religious tests for teachers. His findings in this regard are adequately supported by competent substantial evidence and therefore merit no further discussion here.

For the foregoing reasons the decree of the chancellor should b and it is hereby affirmed.

ROBERTS, C.J., TERRELL, THOMAS, DREW, THORNAL and O'CONNELL, JJ., concur.

APPENDIX B

(Opinion Filed April 15, 1961)

IN THE

CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA IN CHANCERY,

59C 4928

HARLOW CHAMBERLIN, etc.,
Plaintiff,

vs.

THE DADE COUNTY BOARD OF PUBLIC INSTRUCTION, *et al.*,
Defendants,

vs.

DAVID HUME, *et al.*,
Intervening Defendants.

59C-8873

EDWARD RESNICK, *et al.*,
Plaintiffs,

vs.

THE DADE COUNTY BOARD OF PUBLIC INSTRUCTION, *et al.*,
Defendants,

vs.

DAVID HUME, *et al.*,
Intervening Defendants.

OPINION

There are two cases here which have been consolidated for the purpose of trial on the issues, such issues being somewhat similar in their allegations and the prayers for relief.

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The gist of the allegations in both complaints are as follows:

1. That under Florida law children are required to attend school. *F. S. A.* Section 232.01, p. 343.

> "All children, except those who become or have become married, unmarried students who are pregnant, and students who have already had a child outside of wedlock, who have attained the age of seven years or who will have attained the age of seven years by February 1 of any school year or who are older than seven years of age but who have not attained the age of sixteen years are required to attend school regularly during the entire school term * * *"

2. That under another Section a penalty is provided for failure of such children to attend. *F. S. A.*, Section 232.09, p. 356.

> "Each parent of a child within the compulsory attendance age shall be responsible for such child's school attendance as required under the provisions of Sections 232.01-232.19. The absence of a child from school shall be prima facie evidence of a violation of this section; provided, that no parent of a child shall be held responsible for such child's nonattendance at school under any of the following conditions.
>
> (1) With permission.—The absence was with permission of the head of the school; or
>
> (2) Without knowledge or unable to control.—The absence was without the parent's knowledge, consent, or conivance; or that he or she has maide a bona fide and diligent effort to control and keep the child in

school and that he or she is unable to do so; in which cases the child shall be dealt with as a delinquent; or

(3) Financial inability.—That he or she was unable financially to provide necessary clothes for the child, which inability was reported in writing to the county superintendent prior to the opening of school or immediately after the beginning of such inability; provided, that the validity of any claim for exemption under this subsection shall be determined by the county superintendent subject to appeal to the county board; or

(4) Sickness, injury, or other insurmountable condition.—That attendance was impracticable or inadvisable on account of sickness or injury, attested to by written statement of a licensed practicing physician, or was impracticable because of some other stated insurmountable condition as defined by regulations of the State board; or

(5) Distance exemption.—That attendance was impossible because of the distance of the home of the child from the nearest school and the lack of transportation at public expense, as set forth in Section 232.06."

3. That the children of the plaintiffs and the children of other parents in like situations do attend the public schools of Dade County, Florida, which schools are under the supervision and control of the defendant, school board, *F. S. A.*, Section 230.01, p. 174, Section 230.02, p. 175, 176. Section 230.02, p. 176:

"Each county shall constitute a unit for the control, organization, and administration of schools."

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"A county school system shall include all public schools, classes, and courses of instruction and all services and activities directly related to education in that county which are under the direction of the county school officials."

"The county school system shall be controlled, organized, administered, and supervised as follows:

(1) County system.—The county school system shall be considered as a part of the state system of public education. All actions of county school officials shall be consistent and in harmony with state laws and with rules and regulations and minimum standards of the state board. County school officials, however, shall have the authority to provide additional educational opportunities, as desired, which are authorized but not required by law.

(2) County board.—Responsibility for the organization and control of the public schools of the county shall be vested in the county board, as provided in Sections 230.04-230.23.

(3) County superintendent.—Responsibility for the administration of the schools and for the supervision of instruction in the county shall be vested in the county superintendent as the secretary and executive officer of the county board, as set forth in Sections 230.24-230.33.

(4) Trustees.—The school district trustees shall constitute an advisory body for the district as set forth in Sections 230.34-230.43.

(5) Principal or head of school.—Limited responsibility for the administration of any school or schools at a given school center and for the supervision of instruction therein shall be delegated to the principal or head of the school or schools as hereinafter set forth."

4. That their children while attending school are subjected to "religious and sectarian practices and instruction", (p. 2-p. 4, Case No. 59C 4928, Harlow Chamberlin) which are listed as follows:

1. *Bible Practices*: (a) The regular reading of verses from the Holy Bible in assemblies and classrooms; (b) explanation, comments and expansion by teachers on verses of the Holy Bible so read; (c) the distribution of the Holy Bible and other religious and sectarian literature among the children attending the public schools and (d) the use of public school facilities for Bible instruction after school hours.

2. *Prayers and Grace*: The regular recitation of (a) the Lord's Prayer; (b) other religious and sectarian prayers, and (c) grace.

3. *Religious Hymns*: The regular singing of religious and sectarian hymns at assemblies and within classrooms.

4. *Religious Holiday Observances*: The observance of the Christmas holiday through sectarian programs including Nativity plays, pageants and scenes as well as instruction in the dogma of the Nativity; (b) the observance of the Easter holiday through sectarian programs including Resurrection plays, pageants and scenes as well as instruction in the dogma of the Resurrection; (c) the observance of Hanukkah,

including the lighting of the candles, and the observance of Passover.

5. *Religious Symbols*: The placing of religious and sectarian symbols in the assembly rooms, classrooms and other parts of the public school premises.

6. *Baccalaureate Program*: The conducting of religious and sectarian baccalaureate programs.

7. *Religious Census*: The conducting of a religious census among the children to ascertain their own religious affiliations and the religious affiliations of their parents.

8. *Religious Test for Teachers*: The imposition of a religious test for teachers and other employees of the public school system as well as the use of religious criteria in the employment and evaluation of teachers and other employees of the public school system."

5. That such acts are violative of their Federal and State constitutional rights as follows:

F. S. A. Constitution, pp. 111, 112, *Amendment (I)*.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

F. S. A. Constitution, pp. 132, 133, *Amendment XIV*.

Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Florida Constitution, p. 539, *Amendment 6*.

Section 6. "No preference shall be given by law to any church, sect or mode of worship and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution."

The defendant, The Dade County Board of Public Instruction in its answer alleges that the school board after many years of operating under an unwritten rule adopted the following rule:

Resolution No. 60-21 of the Board of Public Instruction of Dade County, Florida, Regarding Bible Reading.

"WHEREAS, Section 231.09 (2), Florida Statutes, provides:

"Duties of instructional personnel—(2) Bible Reading—Have, once every school day, readings in the presence of the pupils from the Holy Bible, "without sectarian comment.":

and

WHEREAS, the principals of the various schools have, for many years, been instructed to release any child

from participating in the daily reading of the Bible if request for his release has been made by his parent or guardian; and

1. That the Bible be read daily without sectarian comment in each of the schools in the Dade County School System.

2. Any pupil shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.

3. That if any non-academic activity in the schools be deemed by a parent or guardian to be violative of the religious conscience of such parent or guardian of any child in the public school system, that such parent or guardian shall have the right to request the release of his child from participating therein, and the various principals shall grant such request, making proper provision for the orderly care of such released children.

Passed and Adopted this 29th day of June, 1960."

The school board admitted certain of the practices complained of but denied such practices were violative of any constitutional rights of the plaintiffs and denied other of the allegations in the complaint.

Several persons were permitted to intervene claiming they and persons alike situated had an interest in the cause.

Much testimony was taken over a long period of time and the court makes the following findings of facts:

That upon school being opened in the morning and the classes convened, a three to five minute period is utilized during which time a devotional is read, which usually is the reading of a verse from the Old Testament or the New

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Testament of the Holy Bible, a pledge of allegiance to the Flag of our Country is given and the Lord's Prayer is said.

The court finds from the testimony that on one occasion comment was made by a person about a verse read from the Bible, but this was an isolated incident and was forbidden by law. This comment was not made by the teacher and the court finds that this is not the general practice in the classroom.

The court finds that under a policy of the school board, Holy Bibles or the official Holy Book of any other religious sect may be given to seventh grade pupils on a strictly voluntary basis and that the principals and teachers may conduct this distribution without sectarian comment on the school premises, but finds that none have been distributed under this rule, for a period of five years.

There was testimony from Mrs. Resnick, wife of one of the plaintiffs, who said she saw a book for distribution, which has been introduced in evidence as "Resnicks' Exhibit No. 1," but the evidence offered by the defendant is so persuasive that the testimony of Mrs. Resnick standing alone cannot be said to prove that such has been shown to be conclusive evidence.

The court finds that the Lord's Prayer is said, sometimes in unison by the pupils, during the three to five minute time at the opening of school. That other prayers are said, but no definite prayer other than the Lord's Prayer has been sufficiently set out for the court to pass on the words used in such other prayer or prayers.

The court finds also that no conclusive and definite proof has been offered to substantiate that grace is said in the schools.

The court finds also that programs are held on Christmas depicting the Nativity scenes and Hanukkah celebra-

tion, such as the lighting of the candles. That at Easter, programs are held depicting the death of Christ on the Cross and the Resurrection.

The court further finds that children may be excused from attending these programs, although testimony was given that in some instances the request to be excused was denied by the teacher; when requested by the student and not the parent, but further testimony revealed that the teacher was not apprised of the school board regulations or did not know of the passage of Rule 60-21.

The court also finds that from time to time hymns are sung on school premises, such as "Hark, the Herald Angels Sing," "O, Little Town of Bethlehem," "Deck the Halls with Boughs of Holly," as well as "Silent Night," "Jingle Bells" and "White Christmas."

That religious symbols such as the Cross, Nativity scenes and the Star of David have been displayed in the schools at or about the time of Christmas and Easter. That such were usually prepared by the children. On one occasion a gift to the school of a picture of Christ was displayed in a school.

The court finds in regard to baccalaureate programs that they are held at times off of school premises at which time a minister, priest or rabbi is invited to address the assembled students. That attendance of the student is optional and that such programs are not held during school hours.

The court finds as to religious census of students that on a few occasions some students have been asked about their religious preference but it is the court's findings that such is not a general occurrence nor is it required nor requested by the school board.

As to religious tests for teachers, the court finds that on the application for positions as teachers there is a ques-

tion to be answered, "Do you believe in God?", but that there are no religious tests imposed upon teachers. The court further finds no evidence of religious criteria and evaluation of teachers or other employees of the school system.

As to Bible reading in the schools, counsel seems to rely on the holdings in the case, *People, ex rel McCollum* v. *Board of Education*, (1948), 333 U. S. 203, 68 S. Ct. 461, as a precedent for a ruling in this case. A careful analysis of the holding in the *McCollum* case reveals that the facts were "the use of tax supported property for religious instruction." In this case, we do not have the problem of "religious instruction" but rather the reading of a verse from the Holy Bible that has in it, expressions or wording that we all use every day, such as "Thou shalt not kill" even though it might be used in a different form. In almost every creed, religion or belief, the words of the Golden Rule are a way of life by which we should live if we are to exist peaceably.

This is not a Godless nation of people. Justice Douglas, in a decision of March, 1952, said: "We are a religious people whose institutions presuppose a Supreme Being."

In 1948, Justice Jackson wrote: "One can hardly respect a system of education which should leave the student wholly ignorant of the currents of religious thought that move the world society • • • for a part in which he is being prepared."

When the liberty bell was cast, it had inscribed on it the words of Moses, "Proclaim liberty throughout the land unto all inhabitants thereof." *Lev. 25.10.*

In our Declaration of Independence, there are four specific references to the dependence of our nation on Almighty God: "• • • the laws of nature and of natures God entitle them • • •"; "• • • all men • • • endowed by their Creator with certain inalienable rights • • • •"; "• • • to

the Supreme Judge of the world * * * ," * * * with a firm reliance on the protection of Divine Providence" * * *."

On our coin of the realm is inscribed "In God We Trust."

Congress approved a design of the dollar bill on June 20, 1782, which has the "Eye of God" above the pyramid over which are the words "annuit coeptis" which signified "He (God) has favored our undertakings."

The oath taken by government employees, witnesses in court and others conclude with the words, "So help me God."

On April 20, 1953, a resolution was introduced in the House of Representatives to add the words "under God" to the pledge of allegiance, which passed the Congress and was signed into law by President Eisenhower on June 14, 1954.

Our Presidents of the United States, from the first to the last, have invoked the guidance of a Supreme Being in their inaugural address, "God helping me I will not fail." "I ask the help of Almighty God in this service to my country", "we humbly ask the blessing of God * * *" and "may He guide me in the days to come."

A joint resolution was adopted by Congress on July 20, 1956, establishing as the National Motto of the United States the words: "In God We Trust."

These few references are cited, among the many, to indicate that not only the people of this great nation but its leaders and the government, itself, is committed to a belief in a Supreme Being.

How then can we ignore the words of Justice Jackson cited above?

> "One can hardly respect a system of education which should leave the student wholly ignorant of the currents of religious thought that move the world society * * * for a part in which he is being prepared."

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We shall now turn to the language used by our United States Supreme Court for help.

In the *Minersville School District* v. *Gobitis*, the court said:

> "The question remains whether school children, like the Gobitis children, must be excused from conduct required of all the other children in the promotion of National cohesion."

The facts were that the Gobitis children were expelled from school for their refusal to salute the Flag of our country because the gesture required during the salute "was forbidden by command of scripture." One will notice that the salute with its gestures was required and expulsion followed because of the refusal. Nothing could be more compulsory.

Again quoting from the above case:

> "That the flag salute is an allowable portion of a school program for those who do not invoke conscientious scruples is surely not debatable."

This would seem to indicate that if a dissident was excused or had the right to be excused, then the program was constitutional.

Let us turn to the latest case, at this time, the case of *Zorach* v. *Clauson*, 343, U. S. p. 679, to review the facts:

> "New York City has a program which permits its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises, a student is released on written request of his parents. Those not released stay in the class rooms."

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While the facts in the *Zorach* case as the United States Supreme Court pointed out are not the same as in the *McCollum* case, because in our case the school property was used for the program complained of, some of the language used by the Supreme Court in the *Zorach* case may be of help.

. . . . .

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government shows a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competi-

tion between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here."

From the words above used, can it be said that the use of a school room for the reading of a verse from the Bible, the saying of the Lord's Prayer and salute to the flag, from which program a student may be excused by request, is violative of the constitutional rights of the plaintiffs here? I do not believe so; however, no definite ruling has been made by the United States Supreme Court on Bible reading or prayer in the public school, that court having twice refused to hear appeals from State decisions.

It is evident that after the passage of the resolution by the school board, in the instant case, setting forth the method of requesting that a student be excused from the program where a verse from the Bible is read, that no employee of the school board, teacher or otherwise, can use coercion on any student to attend the program or to stay away from the program.

Let us now turn to rulings by various State Courts for enlightenment.

In the case of *People, ex rel Vollmar* v. *Stanley*, (1927) 81 Colo. 276, 255 p. 610, the Supreme Court of Colorado had before it a mandamus action which sought to compel the school board to "revoke their rule requiring the reading of the Bible as a portion of the morning exercise in the schools in which petitioner's children are in attendance and prohibit such religious exercises in the public schools of said school district."

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The wording of the Colorado constitutional provision is almost the same as Florida's provision under Section 6, "nor shall any preference be given by law to any religious denomination or mode of worship."

The court there held that the Bible was not sectarian and that Bible reading in the school room where a student was not required to attend was not violative of the constitutional rights of the petitioners and said:

> It is claimed * * * that the rule in question denies the petitioners children the free enjoyment of their religion and discriminates against them because of their religion; but, if they need not attend how can that be so? They still exercise their religion as they please, and are neither deprived of anything nor are required to do anything on account thereof.
>
> It is argued that because some sects regard the Bible as sacred and inspired and others not, it is therefore sectarian. Non Sequitur. Sectarian or not cannot be determined of a book by how sects regard it. The decisive question is whether it teaches some doctrine peculiar to a sect. That part which does not is not sectarian. The eloquence of Amos and Isaiah and the wisdom of the parables is sectarian or not whether read from King James Version, the English Revised, the Douai, or any of the many translations, or from any other book."

Colorado, Illinois, Kentucky, Minnesota, Pennsylvania and other States, have ruled that Bible reading in the schools as not violative of a constitutional right when the student is not compelled to attend the exercise.

In the Iowa case, *Moore* v. *Moore*, (1884) 64 Iowa 367, 20 N. W. 475, the court said that it could not regard the objection as having great weight, so long as the plaintiff's

children were not compelled to be in attendance at a morning exercise where a selection from the Bible was read with a program including repeating of the Lord's Prayer and singing of religious songs.

In the Kentucky case, *Hackett* v. *Brooksville*, (1905), 120 Ky. 608, 87 S. W. 792, 69 L. R. A. 592, the court held that reading from the Bible, without comment, and giving an informal prayer in the public school does not make the schoolhouse a house of religious worship.

In *Billiard* v. *Board of Education*, (1904) 69 Kan. 53, 76 p. 422, 66 L. R. A. 166, 105 Am. St. Rep. 148, the Kansas Supreme Court held that the recitation of the Lord's Prayer and the Twenty Third Psalm from the Bible as a morning exercise, without comment, or remark, none of the students being required to participate, was not a form of religious worship and violated neither of those sections of the Bill of Rights of the State nor the Federal Constitution.

It would seem to this court that the Golden Rule should be observed by those selecting verses from the Bible to read so that the Old Testament when agreeable would be used and only verses not highly controversial would be read, in order not to offend any student or his parent.

A careful reading of these cases and the cases in those States that ruled otherwise and the United States Supreme Court opinions leads the writer to the following conclusion:

1. That the State law requiring the reading of the Bible, without sectarian comment, in the public schools coupled with the defendant school board's ruling of a student being excused from the exercise when requested is not unconstitutional.

2. That in view of the above, the reading of the Bible, without sectarian comment, where the student may upon request be excused, should not be enjoined.

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One of counsel for the plaintiffs when asked by the court how he would like to see an injunctive order worded on the reading of the Bible in the schools, when many of the verses were in everyday usage, said that it should read, in his opinion, "Thou shall not read the Bible in the schools." *Arguendo.* It would seem then that the objection is to the fact that the verse is read from the Bible and not the fact that the verse is given without the student being told that it is a verse from the Bible or without the student knowing the verse was from the Bible.

There is nothing in the Florida law that requires that the student be told that it is a quote from the Bible or that the student should be told from what book or verse the quotation was taken. If so, it might be considered sectarian comment, which is forbidden by the Statute and the court is not passing on that point of law.

There has been some comment to the effect that a pupil asking to be excused from the exercises is put to some disadvantage because of non-conformity and sometimes subject to ridicule or hostility because he asks to be excused. This matter was handled according to the testimony of a teacher in this case by sending two pupils on an errand who had asked to be excused from the exercise. The errand took approximately five minutes and no embarrassment was caused the students.

As was found in the finding of fact there is no evidence before the court except in an isolated incident that any comment or explanation was made on the verse read from the Bible and there is express restriction in the act itself from so doing.

As to distribution of Bibles in the schools, the testimony reveals that although under the administrator's handbook students may be given the opportunity to accept, on a strictly voluntary basis, copies of the Holy Bible or

the Holy Book of any other religious sect, provided the teachers conduct this distribution without sectarian comment and that no Holy Bibles or Holy Books have been distributed under this policy since its enactment in 1956. No proof having been offered to the contrary no injunctive order is necessary.

As to Bible instructions in school after school hours, there is proof in the record that after school hours Bible instruction was given on school premises on a purely voluntary basis. There is further proof that some schools have been used by churches of many denominations after school hours without charge from the school board and I find nothing in this case to conflict with the views expressed by the Supreme Court of the State of Florida in its ruling in the case of *Southside Estate Baptist Church* v. *Board of Trustees*, cited in 115 So. 2d, p. 697.

Although there seems to be two lines of decision on this matter our Supreme Court in the above case has followed the holding that:

> "We find nothing in the conduct of the appellee trustees to suggest the involvement of public funds or property in the establishment of a religion or in preferring one religious faith over another. We agree with those courts which have observed that in the ultimate the American people are basically religious. Their spiritual or theological views might differ, but by and large, they are committed to the ideal that there should be a place for any and all religions in the scheme of our community and social life."
>
> "• • • For example, if the use of the school buildings were permitted for prolonged periods of time, absent evidence of an immediate intention on the part of the Church to construct its own building, we think

it could hardly be contemplated that the public-school system or its property could be employed in the permanent promotion of any particular sect or denomination."

"• • • We, therefore, hold that a Board of Trustees of a Florida School District has the power to exercise a reasonable discretion to permit the use of school buildings during non-school hours for any legal assembly which includes religious meetings; subject of course, to judicial review should such discretion be abused to the point that it could be construed as a contribution of public funds in aid of a particular religious group or as the promotion or establishment of a particular religion."

In the above case the appellee Board of Trustees permitted several churches to use various school buildings during Sunday, non-school hours. The authorization was for the *temporary* use of the buildings pending completion of construction of church buildings.

Counsel for the plaintiffs here contend that the use of school buildings by the Child Evangelism Fellowship and children are there taught the Divinity of Christ, which organization has been conducting these non-denominational classes after school hours in various schools for a long period of time and, therefore, such use is not temporary but a permanent arrangement. Students would be excused from the programs upon request.

This court feels that this does seem from the evidence to be a continuing and permanent arrangement and is not one of a temporary nature and should be enjoined.

As to religious Hymns sung in the schools, there is evidence that some songs are sung which could be termed religious in nature around the Christmas and Easter holi-

days. The songs that were sung such as "White Christmas," "Jingle Bells," "Silent Night," "O, Come all ye Faithful," and others are so closely interwoven with the thoughts of the Christmas and Hanukkah season that it would be impossible for this court to rule on songs that might be considered by some to be sectarian. Again, the student is not requested and compelled to attend the exercises where the songs are sung.

As to the saying of the Lord's Prayer, in schools, again the fact is ever present that the student may be excused upon request.

However, in the case of *Doremus* v. *Board of Education of Borough of Hawthorne*, (1950), 5 N. J. 435, 75 A. 2d 880, App. Dismd. 342 U. S. 429, 96 L. ed. 475, 72 S. Ct. 394, a New Jersey case, it was said:

"* * *

"As to the permissive repeating of the Lord's Prayer: That short supplication to the Divinity was given its name because it was enjoined by Christ as an appropriate form of prayer. It is used by Roman Catholics and Protestants with slight variations. But nothing therein is called to our attention as not proper to come from the lips of any believer in God. His fatherhood, and His supreme power. Christ was a Jew and He was speaking to Jews: and it is said, on excellent Jewish authority, (Dr. Philip Bernstein, Rabbi of the Temple B'reth Kodesh, Rochester, N. Y., 'What the Jews Believe', Life Magazine September 11, 1950, p. 161), that the prayer was based upon the ancient Jewish prayer called 'the Kaddish'—'Exalted and hallowed be the name of God throughout the world * * * May His Kingdom come, His Will be done'. *We find nothing in the Lord's Prayer that* is controversial,

ritualistic or dogmatic. It is a prayer to 'God, our Father'. It does not contain Christ's name and makes no reference to Him. It is, in our opinion, in the same position as is the Bible reading and needs no special comment beyond what has just been said. * * *"

Again, in *Engel* v. *Vitale*, (1960), a New York case, cited in 206 N. Y. S. 2d, p. 183, the Supreme Court, appellate division, said in speaking of the so-called "Regents' Prayer", which is quoted as follows:

"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."

Also, in *Engel* v. *Vitale*, Justice Beldock said:

"I have no doubt that the compulsory recitation of a prayer in the classroom violates the constitutional provisions. I have concluded, however, that the prayer here involved (which I agree is non-sectarian and non-denominational), does not constitute religious teaching and, if voluntary and circumscribed by proper safeguards, does not violate the constitutional proscription of laws 'respecting an establishment of religion.' Nor do I find the prayer to be in conflict with recent decisional law on the related subject of teaching sectarian religion during the 'released time' period.

From the point of view of policy I fully subscribe to the statement of principle in the Regents' Statement of Moral and Spiritual Training in the Schools, adopted November 30, 1951, to wit: "Belief in and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded." It cannot be gainsaid that, above all things, it is essential for our children to be exposed to programs which

emphasize the moral and spiritual heritage which is America's and to be inspired by the examples of their ancestors toward a greater respect for lawful authority, for love of God and respect for parents and home. However, we are not now dealing with a matter of policy, but with one of power.

The basic issue here deals with the power of the school board to direct the recital of this prayer on school premises under the supervision of the school teachers. It is not disputed by the litigants that the prayer is of a religious nature. The main dispute is as to whether it is religious instruction and whether it is said by the stu. nts under compulsion * * *"

I can see no vital difference in the Lord's Prayer and the Regents' Prayer in so far as it applies to the constitutional provision against the establishment of religion.

The prayer for injunction to prevent the saying of the Lord's Prayer in the public schools of Dade County, so long as the rule providing for a student to be excused upon request will be denied. There being no believable testimony that grace is being said, there is no need for an injunction.

Religious Holiday Observances. There is testimony that there are plays around Christmas depicting the Birth of Christ and around Easter of the Crucifiction of Christ, which could be termed religious teaching and the same will be enjoined as being religious teachings on school property.

Moving Pictures. There is also testimony that moving pictures, which to some degree are religious in their nature as they depict various religious happenings, are shown to the pupils in schools and the same should be and will be enjoined by this court from being shown in the public schools as being religious teachings.

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Religious Symbols. There is testimony that Nativity scenes, made by the children in art work were displayed and that a Cross and the Star of Bethlehem was displayed on the outer cover of a Christmas school program and that the Star of David was displayed. To hold that these displays were such as to violate any constitutional rights of the plaintiffs and that such acts would be enjoined would be to hold that the children could not wear and display such symbols in school, such as a piece of jewelry and will not, therefore, be enjoined.

Baccalaureate Program. There is testimony to show that Baccalaureate programs are held on school property and outside of school property at which program a minister, priest or rabbi does appear to address the students. Such programs are held after school hours and attendance by the student is optional. This court cannot assume that at these programs religious teachings are resorted to by the rabbi, minister or priest. If such testimony was in the record that such was true it would be enjoined but as there is none, no injunction will issue.

Religious Census. There is no testimony before this court relative to any religious census being taken of the students in any of the schools by the school board. Only one or two witnesses are present in the record of any reference to students religion. One, where a teacher asked if there were any students who did not belong to a church, and the other where a teacher asked questions of religious preference of his students for his own personal knowledge. Such questions not being approved by the school board and being of such an isolated nature no injunction will be granted.

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Religious Tests for Teachers. The only evidence of any religious test for teachers is that contained in the application forms for teachers, which is, "Do you believe in God." I cannot see how such a question to a teacher can possibly be violative of any constitutional right of the plaintiffs in this case, while it might be considered, if one of the plaintiffs were a teacher, no injunction will be granted as effecting the plaintiffs here.

An appropriate Order will be entered by the court in accordance with the views expressed in this Opinion.

/s/ J. Fritz Gordon
J. Fritz Gordon, Circuit Judge

Office-Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term
1962

No. 520

HARLOW CHAMBERLIN, on his own behalf and in behalf of all others similarly situated,

Appellant,

vs.

THE DADE COUNTY BOARD OF PUBLIC INSTRUCTION, et al.,

Appellees,

vs.

DAVID HUME, et al.,

Intervening Appellees.

EDWARD RESNICK, PHILIP STERN, AND ELSIE THORNER, in their own behalf, and in behalf of all other persons similarly situated,

Appellants,

vs.

THE DADE COUNTY BOARD OF PUBLIC INSTRUCTION, et al.,

Appellees,

vs.

DAVID HUME, et al.,

Intervening Appellees.

MOTION OF APPELLEES, THE DADE COUNTY BOARD OF PUBLIC INSTRUCTION, ET AL., TO DISMISS.

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Intervening Appellees.

MOTION OF APPELLEES, THE DADE COUNTY BOARD OF PUBLIC INSTRUCTION, ET AL., TO DISMISS.

Appellees, The Dade County Board of Public Instruction, et al., pursuant to Rule 16 of the Revised Rules of this Court, move to dismiss those portions of the appeal embraced in questions (2) (c), (d) and (e) of the Appellants' questions presented on appeal upon the grounds (A) that the Appellants have no standing to raise the questions so presented, and (B) that there is no justiciable issue raised by the enumerated questions.

STATEMENT OF THE CASE

These are two separate actions challenging the constitutionality of a variety of alleged religious practices taking place in the schools of Dade County, Florida. The Appellant Chamberlin is the father of two children in the public schools of Dade County, one child being enrolled in the North Miami Elementary School and the other child enrolled in the North Miami High School as of the time of completion of the trial. The Appellant Thorner is the parent of a child in Sunset Elementary School and the Appellants Stern and Resnick are parents of children in Biscayne Elementary School. After a trial on the issues, Circuit Judge J. Fritz Gordon rendered his decision dismissing the complaint with relation to the conducting of religious and sectarian baccalaureate programs, the conducting of a religious census among the children to ascertain their own affiliation and the religious affiliation of their parents, and the conducting of religious tests as to the qualifications of teachers for employment. The Appellants took an appeal to the Supreme Court of Florida from the above-mentioned rulings and others of the Circuit Court. The Florida Supreme Court, *inter alia*, affirmed the lower Court as to its ruling on baccalaureate programs, religious census and religious tests for teachers.

The evidence at the trial reflected that the children of the Appellant parents were all enrolled in elementary schools except for the older Chamberlin child who was to be enrolled in North Miami Senior High School in the tenth grade at the time of completion of the trial. (TR 112). None of the children testified and neither the Appellant parents nor anyone else testified that the children of Appellants had been subjected to a religious census, as alleged in the complaint. The evidence did indicate that, as a rule, the permanent record filled out by parents or children, depending on age of child, reflects religious preference of the child (TR 537). The testimony of Appellant parents did not indicate that they or their children had filled out such a record. Evidence was adduced at the trial that certain questions as to religious preference were asked of pupils in Palmetto Senior High School (TR 1206) and in North Miami High School (TR 345, 378); however, there was no evidence connecting Appellants' children with these two isolated incidents. The record indicates that all of the Appellants were parents of children enrolled in the public schools of Dade County and does not establish that any of said parents were teachers in the Dade County School System, nor were the Appellants so designated in the pleadings.

The lower Court summarily dismissed the complaint with reference to the allegations of conducting religious tests as qualifications for the employment of teachers upon the ground that no teacher was a party to this cause. Therefore there has been no express ruling of the lower Court on the constitutionality of religious tests for teachers.

THE FEDERAL QUESTIONS NOT PROPERLY RAISED

Briefly stated, the questions presented by the Appellants which Appellees seek to dismiss are as follows:

> **(2) Are such provisions of the United States Constitution [the establishment of religion and free exercise clause of the First Amendment] violated by any or all of the following practices of the Appellee; Dade County Board of Public Instruction:**
>
> **. . . .**
>
> **(c) the conducting of religious and sectarian baccalaureate programs?**
>
> **(d) the conducting of a religious census among the children to ascertain their own religious affiliations and the religious affiliation of their parents?**
>
> **(e) the conducting of religious tests as a qualification for the employment of teachers?**

All of the questions so raised were improperly raised since the parents of the pupils had no standing to raise constitutional questions which did not affect them or their children, and consequently there is no justiciable issue raised by these points.

ARGUMENT

I. The Appellants have no standing to complain of the conducting of religious and sectarian baccalaureate programs.

The evidence in this case clearly indicates that all of the children involved here save one were enrolled in elementary schools of the Dade County Public School System. The other child, the child of the Appellant Chamberlin, was at time of trial a sophomore at North Miami High School. The evidence clearly indicates that baccalaureate programs are conducted only on graduation from high school. (TR 1086)

Appellants asserting constitutional rights have no standing to sue unless adversely affected. *Poe v. Ullman*, 367 U.S. 497, 503-504, 81A Sup.Ct. 1752, 1756 (1961); *Tileston v. Ullman*, 318 U.S. 44, 63 Sup.Ct. 493 (1943); *Voeller v. Neilston Warehouse Co.*, 311 U.S. 531, 537, 61 Sup. Ct. 376, 378 (1941). A request for declaratory relief does not remove the requirement of standing. *Doremus v. Board of Education* 342 U.S. 429, 72 Sup. Ct. 394 (1952); *Coffman v. Breeze Corporation* 323 U.S. 316, 65 Sup. Ct. 298 (1945). The Supreme Court of the United States has long held that the rendering of advisory opinions is a "function never conferred upon it by the Constitution, and against the exercise of which this Court has steadily set its face from the beginning." *Muskrat v. United States*, 219 U.S. 346, p. 362 31 Sup. Ct. 250 (1911). The Appellants made no attempt in the trial of the case below to connect the practice complained of with their own children. None of the Appellants' children testified.

II. The Appellants have no standing to raise the question concerning the conducting of the religious census among the children to ascertain their own religious affiliation and the religious affiliation of their parents.

The evidence at the trial indicated that permanent records are kept in the school system showing, among other things, religious preferences of pupils and their parents. (Tr. 537). However, there is no testimony in the record to indicate that any of the Appellants or their children had such a card or record or supplied such information to any person in the School system. Testimony was submitted as to isolated incidents of a poll being taken of the religious beliefs of the pupils at Palmetto High School (Tr. 1205-1207) and another instance in which a teacher polled the children of a class in North Miami Senior High School as to their religious preferences. (Tr. 345, 378). However, there was no evidence submitted connecting the children of these Appellants with such isolated incidents. As in the present case, the State Court in *Doremus v. The Board of Education, supra*, rendered an opinion on a Federal constitutional problem under such circumstances as could only be regarded as advisory. As was said by this Court in *Doremus* in 342 U.S. at 439:

> "We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of 'case or controversy', we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without

review, any procedure which does not constitute such."

The United States Supreme Court has held that it will not pass upon the constitutionality of a complaint of one who fails to show that he was injured by the operation of the statute or practice. *Coffman v. Breeze Corporation* 323 U.S. 316, 324-325, 65 Sup. Ct. 298, 303 (1945). Therefore since the Appellants have failed to connect their children with the taking of a religious census they cannot be heard to complain of the unconstitutionality of the practice as applied to others.

III. The Appellants have no standing to complain of the conducting of religious tests as a qualification for the employment of teachers.

The Appellants have no standing to question the constitutionality of asking prospective teachers whether they believe in God. Only teachers or applicants for teaching positions have the necessary justiciable interest to raise this issue. The Appellants have no standing to assert the rights of others. *Tileston v. Ullman* 318 U.S. 44, 63 Sup. Ct. 493 (1943); *Tyler v. Judges of the Court of Registration* 179 U.S. 405 21 Sup. Ct. 206 (1900). With regard to the question of religious tests for teachers, the lower Court has made no decision as to the constitutionality of the practice but rather has ruled from the inception that the Court had no question to decide since no teachers were Plaintiffs in this action. See Sup. Ct. Rule 16 (1) (b).

CONCLUSION

We respectfully submit, therefore, that the Appellants present no properly raised Federal question for the decision of this Court with regard to the questions (2) (c), (d) and (e) and that the Court should refuse jurisdiction of this portion of the appeal.

BOLLES & PRUNTY,
Attorneys for THE BOARD OF PUBLIC INSTRUCTION OF DADE COUNTY, FLORIDA

By George C. Bolles
George C. Bolles

PROOF OF SERVICE

I HEREBY CERTIFY that on the 16 day of November, 1962 I served a copy of the foregoing Motion to Dismiss upon the following counsel of record:

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